Richard J. Durbin, Patty Murray, and Charles E. Schumer.

The PRESIDING OFFICER. By unanimous consent, the mandatory quorum call has been waived.

The question is, Is it the sense of the Senate that the debate on the motion to proceed to S. 2038, a bill to prohibit Members of Congress and employees of Congress from using nonpublic information derived from their official positions for personal benefit, and for other purposes, be brought to a close?

The yeas and nays are mandatory under the rule.

The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. DURBIN. I announce that the Senator from Louisiana (Ms. LANDRIEU) and the Senator from New Jersey (Mr. MENENDEZ) are necessarily absent.

Mr. KYL. The following Senators are necessarily absent: the Senator from Georgia (Mr. ISAKSON), the Senator from Illinois (Mr. KIRK), and the Senator from Mississippi (Mr. WICKER).

The yeas and nays resulted—yeas 93, nays 2, as follows:

[Rollcall Vote No. 3 Leg.]

YEAS—93

Akaka	Franken	Moran
Alexander	Gillibrand	Murkowski
Ayotte	Graham	Murray
Barrasso	Grassley	Nelson (NE)
Baucus	Hagan	Nelson (FL)
Begich	Harkin	Paul
Bennet	Hatch	Portman
Bingaman	Heller	Pryor
Blumenthal	Hoeven	Reed
Blunt	Hutchison	Reid
Boozman	Inhofe	Risch
Boxer	Inouye	Roberts
Brown (MA)	Johanns	Rockefeller
Brown (OH)	Johnson (SD)	Rubio
Cantwell	Johnson (WI)	Sanders
Cardin	Kerry	Schumer
Carper	Klobuchar	Sessions
Casey	Kohl	Shaheen
Chambliss	Kyl	Shelby
Coats	Lautenberg	Snowe
Cochran	Leahy	Stabenow
Collins	Lee	Tester
Conrad	Levin	Thune
Coons	Lieberman	Toomey
Corker	Lugar	Udall (CO)
Cornyn	Manchin	Udall (NM)
Crapo	McCain	Vitter
DeMint	McCaskill	Warner
Durbin	McConnell	Webb
Enzi	Merkley	Whitehouse
Feinstein	Mikulski	Wyden

NAYS—2

Burr	Coburn

NOT VOTING—5

Isakson	Landrieu	Wicker
Kirk	Menendez	

The PRESIDING OFFICER. On this vote, the yeas are 93, the nays are 2. Three-fifths of the Senators duly chosen and sworn having voted in the affirmative, the motion is agreed to.

The Senator from Connecticut.

MORNING BUSINESS

Mr. LIEBERMAN. Mr. President, I ask unanimous consent that the Senate proceed to a period of morning business, with Senators permitted to speak therein for up to 10 minutes each, and that Senator GRASSLEY be recognized to speak for up to 20 minutes.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

ORDER OF BUSINESS

Mr. LIEBERMAN. Mr. President, on behalf of the majority leader, he has asked me to announce there will be no more votes tonight.

If I may say, on my own behalf, we will go to the STOCK Act, S. 2038, tomorrow morning and hope anyone who has a relevant amendment will come to the floor and offer it.

I yield the floor.

The PRESIDING OFFICER (Mrs. HAGAN). The Senator from Iowa.

ORDER OF PROCEDURE

Mr. GRASSLEY. Madam President, I have been asked by Senator BROWN of Ohio if he could be recognized immediately after me.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

RECESS APPOINTMENTS

Mr. GRASSLEY. Madam President, one week ago today, I addressed the Senate on President Obama's decision to bypass the Senate, and the Constitution as well, by making four ''recess'' appointments at a time when the President's recess appointment power did not apply.

I explained in detail why the legal memo released by the Obama administration attempting to justify President Obama's actions did not hold legal water.

Last Thursday, I laid out the case that this is not an isolated incident or a technical legal squabble. Rather, the President's recent actions are part of a pattern of disregard for the constitutional system of checks and balances.

Today, I will address why such criticisms are justified and why such criticisms are necessary.

First, is it legitimate for a U.S. Senator to criticize a legal opinion issued by the Office of Legal Counsel and the Senate-confirmed head of that office?

I have no doubt Senators may criticize such opinions and, when the facts warrant, ask whether that office and its head are exercising the independence that is required for the Constitution to be upheld. Recently, we read some in the media apparently disagreed with this. They say it is wrong for a Senator to ever criticize a Senate-confirmed official's independence and judgment. They say that all a Senator can do is criticize the official's substantive arguments.

I say nonsense. When the media makes these claims, it merely seeks to divert attention from the weakness of the opinion's actual conclusions and reasoning. In my statement last week, I laid out my disagreement with the contents of the Office of Legal Counsel. Of course, Senators and administration officials can reach different conclusions on the law; each can have a reasonable point of view; but that is not the case here.

If the Office of Legal Counsel is to be ''the Constitutional conscience of the administration'' that some in the media characterize it to be, it must exercise a certain level of independence, as I mentioned in my statement.

When a President who takes an expansive view of his power asks the Justice Department officials, who owe their job to him, whether he has the constitutional or legal authority to take such action, there is always the chance that pressure will overtake their responsibilities to provide their best legal judgment.

That is why at Ms. Seitz' confirmation hearing and in a followup communication, we took very painstaking efforts to give her the opportunity to state on the record her commitment to providing independent legal advice, to make sure she would place loyalty to the law and loyalty to the Constitution above her loyalty to the President. That was our purpose. Ms. Seitz promised to act independently. She promised not to stand idly by if she thought the Constitution was being violated.

The only way to tell whether the office has given independent advice, the only way to tell whether pressure has been resisted, is to review the arguments and the reasoning the Office of Legal Counsel provides.

The media cannot address criticism of whether the head of that office is independent and has used good judgment without such a review. It is not enough that the media might agree with her conclusions. In this case, the analysis in the Office of Legal Counsel opinion was so poor as to raise legitimate questions concerning judgment and independence.

The Office of Legal Counsel is supposed to give the President objective legal advice before that person acts. It is not supposed to provide a weakly thought-out rationalization for a Presidential decision to act that has already been made.

Here, the arguments in the opinion are so weak that a fair-minded person can question the independence and judgment of the opinion's author. For instance, the opinion is internally inconsistent. It correctly recognizes that a President's ability to make recess appointments turns on the capacity of the Senate to conduct business. But in determining whether the pro forma sessions constitute a recess, the opinion does not consider at all the capacity of the Senate to conduct business and what it could do. Rather, it relies upon what individual Senators said, not what the institution said or can do, and it ignores not only what theoretically the capacity of the Senate had to act but even its actual actions.

Similarly, the established meaning of the word ''recess'' is the same each

time it appears in the Constitution. Giving the term the same meaning means that the President can make recess appointments, but that this is a limited power.

The Office of Legal Counsel, contrary to clearly established precedent, inconsistently defines the term ''recess'' differently when it was used in different parts of the Constitution. But we cannot do that. The only thing consistent in the opinion is that it interprets recess each time in a way that expands the power of the President to make recess appointments and in such a way as to leave open the question of whether that power is limited in any meaningful way.

Former Federal Circuit Judge Michael McConnell, himself a former Justice Department lawyer who has defended Presidential power, found the arguments in the Office of Legal Counsel opinion to be so implausible—those are his words—that ''it is difficult to escape the conclusion that the Office of Legal Counsel is simply fashioning rules to reach the outcome that it wishes.''

Since the outcome that the Office of Legal Counsel wishes is to expand Presidential power contrary to the text of the Constitution, and also many decades of historical practice, it is quite fair to question the independence, the judgment, and the adherence to statements made during the confirmation process by the head of that office.

The media again focused more on personalities than on substance, and they will say the Bush administration reached a similar conclusion, so how can Ms. Seitz be criticized. That is where the media is coming from.

There are three points to be made that set the record straight for the newspaper.

First, President Bush did not make recess appointments when the Senate was in pro forma session. Secondly, President Bush did not even claim he could make such recess appointments while declining to do so. Third, his Office of Legal Counsel did not issue any opinion that would be binding on future Justice Department advice.

Unlike the public actions of the Senate-confirmed head of OLC, a lower level official in the previous administration, the Bush administration, apparently wrote a secret memorandum to the file on this subject.

The existence of such a memorandum was not known until the Office of Legal Counsel's opinion referred to it and sought to rely on it. It is not possible to evaluate the reasoning of that memorandum because the Department of Justice has not agreed to release it, despite my request that they do release it.

If the Office of Legal Counsel is to exercise the independent judgment that is necessary for it to properly perform its functions, it cannot rely on some sort of secret memo or memos from lower level officials. That approach creates incentives for the Office of Legal Counsel heads to avoid accountability. An incentive is created for the preparation of secret memoranda that make outlandish claims of Presidential power if they cannot be reviewed by anybody. No one knows of the memo. So its arguments do not face the transparency of public scrutiny. The President and Office of Legal Counsel take no responsibility for its conclusions.

Then the Office of Legal Counsel later issues a public opinion on the subject. To bolster very weak arguments, it cites earlier memos. But it avoids transparency as well by keeping the memoranda secret, so no one can see that the opinion's weak arguments may be supported by only other weak arguments. It avoids accountability by suggesting that this question was already decided by an earlier Office of Legal Counsel memorandum.

Instantly, the number of administrations that support expanded Presidential power goes from zero to two, neither one of which is said to be responsible for that expansion. That bootstrapping can never lead to a reasoned, objective analysis of Presidential power.

It cannot produce the independent OLC that Ms. Seitz promised the Senate she would provide at her confirmation. The media has also made the strange argument that Ms. Seitz' opinion must be professional and her judgment and independence cannot be questioned because of her high professional reputation.

Is that not a little bit backward? The legitimacy of the argument contained in a legal opinion is not established by the reputation of the person who wrote it. Reputations are not steady. They are established by the quality of the professional work, not the other way around.

In the past, a prominent Democratic Senator called for a judge to resign because of his legal work as Office of Legal Counsel head. The Washington Post, in an earlier editorial, criticized the opinions of other Bush administration OLC lawyers as displaying ''the logic of criminal regimes'' and ''bringing shame to the American democracy.''

If the Post truly believes that criticizing Office of Legal Counsel lawyers is beyond the pale, they should retract their earlier opinions and condemn the far harsher rhetoric that was hurled against Bush OLC lawyers.

While explaining what is wrong with the newspapers, I now go to explain why my criticisms were not just legitimate but they were absolutely necessary. Last Thursday, I laid out in great detail a long series of abuses of executive authority and usurpation of legislative authority by President Obama and his administration.

In fact, he made his willingness to bypass Congress a campaign issue with slogans such as ''We can't wait for Congress,'' and those headlines and slogans were splashed all across the White House website. President Obama has made the decision to run for reelection not on his record, for obvious reasons, but against Congress. In doing so, he is daring Congress to defend its role as representatives of Americans from each of the 50 States in the face of his unilateral agenda.

Some have suggested this is a clever political trap laid by President Obama; that if Congress resists the President's power grabs, it will validate his slogans and play into his electoral strategy. This may or may not be true. However, the stakes are greater than the next Presidential election, and the implications of the President's actions will be felt well beyond any short-term political gain.

The Framers of the Constitution foresaw the temptation by one branch of government to try to usurp the powers of the other branches. In Federalist 51, James Madison explained how the Constitution was designed to prevent power grabs through an ingenious system of checks and balances.

He wrote this long quote:

> But the great security against a gradual concentration of several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.
>
> The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition.

Of course, this assumes a desire on the part of each branch to guard its constitutionally granted powers.

If some Members of Congress are not willing to resist an encroachment because they place party loyalty above constitutional responsibilities or if members are reluctant to push back for fear of political consequences, then the system of checks and balances will not work as intended by our Constitution writers.

All Members of Congress swore an oath to support and defend the Constitution. That is our first obligation. I want to be clear that this is not an argument about constitutional semantics; it is one of fundamental principle.

As Madison explains in Federalist 51: The ''separate and distinct exercises of the different powers of government'' is ''essential to the preservation of liberty.''

This also goes beyond an argument about the ends to which President Obama has used the new powers he now claims. His agenda is controversial, to be sure, or he would not have had to bypass Congress.

Still, even those who support this President's policies should not be so quick to look the other way. Once the walls separating the powers allotted to each branch of government are eroded, they are very difficult walls to rebuild.

The most eloquent expression of the philosophy on which our Nation was founded is, of course, the Declaration of Independence. I quote the all familiar:

> We hold these truths to be self-evident, that all men are created equal, that they are

endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.

That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. . . .

Based on these fundamental principles, the Constitution laid out a form of government designed to protect individual rights by resisting the concentration of power. This can be frustrating to those who would like a more activist government. Still, these features of our Constitution perform a very important role in preventing one faction of Americans from dominating another faction of Americans.

I am sure President Obama is convinced his agenda is what is best for the country and that the ends justify the means in pursuing that agenda. But that is not the Machiavellian ideas that any of our Constitution writers had.

Naturally, he doesn't see any danger in concentrating power in the Presidency because he believes he will use that power very wisely. Moreover, he has gone out of his way to identify himself with the school of thought that the constitutional separation of powers is an outdated barrier to change.

Last month, President Obama gave a speech in Kansas in which he sought to link his agenda to Teddy Roosevelt's famous ''New Nationalism'' speech at the same place in 1910. The original speech marked the beginning of Roosevelt's break with many of his past policies and with the incumbent Republican President, William Howard Taft.

Roosevelt then went on to challenge Taft in the 1912 election, heading up the Progressive Party ticket. You know that both Roosevelt and Taft lost.

In that 1910 speech to which President Obama paid tribute, Roosevelt described his new nationalism as ''impatient of the impotence which springs from overdivision of governmental power.''

This philosophy seeks to fundamentally transform the United States from a nation founded on the principle that protecting the unalienable natural rights of each citizen is the paramount goal of government to one that empowers an enlightened elite to take whatever actions they deem necessary to correct perceived wrongs in society. In other words, throw the Constitution out the door. This may start out with very good intentions, but there is no guarantee that once our constitutional protections are gone, future leaders will always act in the most enlightened way. In fact, the single-minded pursuit of a better society at the expense of individual rights has led to some of history's worst tyrannies.

Moreover, not only is the concentration of power in the executive branch contrary to the founding principles of our Nation, it is foreign to the realities of American civic life. With a country as large and as diverse as ours, no individual can claim to speak on behalf of all Americans. Our constitutional system, based on federalism, separation of powers, and checks and balances helps ensure that each American has the opportunity to live their life as they see fit.

I return to the words of James Madison:

It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of society against the injustice of the other part.

The voices of all Americans deserve to be heard through the elected representatives of the people. That is what is at stake. Those of us who were elected to represent the people of our States should do just that or we deserve not to be here.

I yield the floor.

The PRESIDING OFFICER. The Senator from Ohio is recognized.

Mr. BROWN of Ohio. Mr. President, I want to take 60 or 90 seconds to discuss the subject that the Senator from Iowa discussed; that is, the appointment of Richard Cordray to the Consumer Protection Bureau. I checked with the Senator's story earlier during this move through the Banking Committee on which the Presiding Officer sits. Never in history has anybody in one party blocked even a vote of a Presidential nominee who is admittedly qualified only because they don't like the agency.

That would be a little like, as Senator REED from Rhode Island said, refusing to confirm an appointee to run the FDA until the Congress weakens food safety laws. It runs counter to everything we believe. I wasn't insisting that my Senate colleagues all support Richard Cordray, former attorney general from Ohio, who is eminently qualified for this job. We were saying to just let it come to an up-or-down vote.

Instead, the minority party filibustered, stopped that, and the President had no choice but to act because the agency simply could not do its job. Only 2 years ago, this agency was created, this consumer bureau, to have a consumer cop on the beat to keep Wall Street banks and payday lenders and everybody in between honest. It took 60 votes in the Senate, including the Presiding Officer and me, and 58 others, to say this agency should be created and the consumer bureau should be in effect. That is the history of that.

RECOGNIZING BRANDON MOORE

Mr. BROWN of Ohio. Madam President, I rise today to honor Detective Brandon Moore, of the Morrow County, OH, Sheriff's Department and Ohio's first recipient of the Congressional Badge of Bravery.

Established in 2008, the Congressional Badge of Bravery is an annual award from the U.S. Attorney General to public safety officers who display bravery in the line of duty.

Earlier this month, Congressman JIM JORDAN and I had the honor of presenting the award to Detective Moore, along with Morrow County Sheriff Steven Brenneman and sheriffs and law enforcement officers from across central Ohio.

It was an honor to meet Detective Moore—to hear his story of heroism and to see his humility firsthand.

In October 2010, Detective Moore was shot multiple times and nearly killed in the line of duty during an ambush and firefight.

When you hear about what happened, you can imagine the scene.

Then-Deputy Sheriff Moore received a report of neighbors engaged in a property dispute.

He traveled to the scene. But in the course of the investigation, he suspected criminal drug activity in one of the homes.

The story quickly turned to the unimaginable.

One of the neighbors came out of his house with an assault rifle and started firing.

Detective Moore was shot in the groin, leg, foot, and abdomen.

As Detective Moore has described it, the normal reaction of fear, shock, doubt, and panic was overwhelmed by a calmness that only highly-skilled police training could provide.

Severely wounded and laying on the ground—Detective Moore first used his belt to create a tourniquet on his leg. He then shot and disabled his assailant from more than 50 yards away.

In doing so, he saved himself, three civilians, and other officers.

Yet his injuries were so life-threatening that he made the unimaginable call to his wife—Diandra, his high school sweetheart—explaining what happened, wanting her to know how much he loved her and their children, Alec and Andrew.

Fortunately, help quickly arrived to the scene.

Detective Moore was airlifted to the hospital for multiple surgeries and where he stayed for a month.

Law enforcement from across central Ohio visited the hospital to show their support—speaking volumes of the solidarity of a sacred brotherhood and sisterhood.

Today, Detective Moore is on the road to recovery—well ahead of schedule.

He was told it could take two or three years before he could return to duty. Detective Moore thinks he'll do it in 18 months.

He recently hit one of his goals of running a quarter of a mile without stopping. Before April, his goal is to run half a mile.

And as difficult as the recovery has been for him—he remains grounded by humility and faith, and the love of his family.

Diandra has been with him on every step of the highs and lows of rehabilitation.

To their children, Alec and Andrew, when you're older, you'll understand more than most people, the meaning of duty, love, and faith.